91-220

(1)

No. 91-___

In The

Supreme Court of the United States

October Term, 1991

DAVID BARLETTA,

Petitioner,

v.

RONALD J. VACCA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether absolute immunity applies to the chair of a local school committee to preclude liability in damages for ordering the removal of a school committee member from a public committee meeting after the member failed to heed the chair's warnings and calls for order?

2. Whether, in a damages claim arising from the removal of a disruptive speaker from a public meeting, a presiding officer's motion for summary judgment based on qualified immunity can be defeated by the speaker's claim that the presiding officer acted with improper motive where *Harlow v. Fitzgerald* expressly repudiated the subjective component of qualified immunity?

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the First Circuit were the Petitioner David Barletta and the Respondent Ronald J. Vacca. *See* App. 1, 2 n.2.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, David Barletta, respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the First Circuit, rendered in the above-entitled proceeding on May 9, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, *Vacca v. Barletta*, is reported at 933 F.2d 31 (1st Cir. 1991), and is reprinted in the appendix hereto, App. 1, *infra*.

The memorandum decision of the United States District Court for the District of Massachusetts (Skinner, D.J.) is reported at 753 F. Supp. 400 (D. Mass. 1990), and is reprinted in the appendix hereto, App. 10, *infra*.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals For the First Circuit, affirming the decision of the United States District Court for the District of Massachusetts denying the Petitioner's claims of absolute and qualified immunity, was filed on May 9, 1991. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rules 10 and 14 of the Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS AND RULES INVOLVED

U.S. Const. Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Mass. Gen. L. ch. 39, § 17 (1913):

> "No person shall address a town meeting without leave of the moderator, and all persons shall, at the request of the moderator, be silent. If a person, after warning from the moderator, persists in disorderly behavior, the moderator may order him to withdraw from the meeting, and, if he does not withdraw, may order a constable or any other person to remove him and confine him in some convenient place until the meeting is adjourned."

Mass. Gen. L. ch. 39, § 23C (1975):

> "No person shall address a public meeting of a governmental body without permission of the presiding officer at such meeting, and all persons shall, at the request of such presiding officer, be silent. If, after warning from the presiding officer, a person persists in disorderly behavior, said officer may order him to withdraw from the meeting, and, if he does not withdraw, may order a constable or any other person to remove him and confine him in some convenient place until the meeting is adjourned."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises from the Petitioner David Barletta's assertion of absolute and

qualified immunity in defense to claims of Respondent Ronald J. Vacca (Vacca) that the Petitioner violated the Respondent's First Amendment rights under 42 U.S.C. § 1983, more particularly his rights to free speech, to represent faithfully his constituency, and to be free from unreasonable seizure, i.e. forcible removal from a school committee meeting after failing to heed the Petitioner's warnings and calls for order. The Respondent was a member of the school committee. The Petitioner was the acting chair at the committee meeting in question, held on August 29, 1988.

This was to be the last meeting of the Committee before the start of the 1988-89 school year. App. 31. The Committee was to act on a recommendation by the Superintendent to restore that seven teaching positions which the Committee had eliminated earlier in 1988 because of budgetary problems. App. 1, 23. The Respondent indicated that he favored restoration of the positions but, nevertheless, interrupted the meeting with accusations that the Superintendent had lied or at least failed to tell the Committee the truth when he had earlier stated that there was not enough money to fund the positions. App. 23-27. A heated dispute between Respondent and the Superintendent ensued. Petitioner attempted to restore order to the meeting by banging his gavel several times and issuing warnings. App. 1, 26-29. The Superintendent, but not the Respondent, fell silent. App. 26-29.

The Petitioner asserted his claims of immunity in a motion for summary judgment which was denied by the Honorable Walter J. Skinner of the United States District Court for the District of Massachusetts. Regarding the

claim of absolute immunity, the District Court, referencing the First Circuit's two-pronged test in *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) for distinguishing between legislative and administrative activity, concluded that although a few of the items on the committee's agenda appeared to be legislative, the topics discussed at the meeting were primarily administrative. App. 16. The District Court held that for that reason, the Petitioner had been "exercising a primarily administrative function during the meeting," and therefore was not entitled to absolute immunity. App. 16.

As to qualified immunity, the District Court concluded that "[w]hether Mr. Barletta actually violated Mr. Vacca's constitutional rights, or whether he merely exercised his right to implement a valid time, place and manner restriction [would] be decided at trial." App. 19.[1] The Petitioner timely appealed the denial of his claims of immunity to the United States Court of Appeals for the First Circuit as a "final decision" pursuant to 28 U.S.C. § 1291.

In affirming, the First Circuit acknowledged that it had not yet decided whether local officials are entitled to absolute immunity but declined to reach that issue because the Petitioner's action did not qualify as a legislative act under the Circuit's two-pronged test. App. 3. In applying that test, the Court stated:

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[1] The District Court also held that there remained material issues of disputed fact as to the Respondent's pendent state law claims.

> "The discussion at the time of Vacca's outburst involved the hiring of seven specific individuals. Although the particular exchange at issue involved budgetary concerns (which Barletta argues are legislative matters), it was clear in context that the parties were simply discussing whether, or how, the money could be found to cover the cost of hiring those particular individuals."

App. 3-4. The First Circuit characterized this as a "primarily administrative function" and therefore ruled that Barletta was not entitled to absolute immunity. App. 4.

Regarding qualified immunity, the First Circuit recognized that the Massachusetts Open Meeting Law, which expressly authorizes the presiding officer of a public meeting of a governmental body to remove a person who persists in disorderly behavior, was a "valid 'manner' " restriction "designed to maintain order during committee meetings." App. 5. In refusing to order summary judgment, the First Circuit concluded that there was a factual issue for trial because the respondent claimed that "Barletta may have acted out some personal animosity." In reaching this conclusion, the First Circuit found persuasive Respondent's question why the superintendent "was not similarly removed" and suggestion that other presiding officers did not remove anyone at prior school committee meetings which "also involved 'heated' disputes. . . . " App. 7.[2]

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[2] The First Circuit addressed only the Respondent's right to free speech. It did not discuss his claims for violations of his right to represent his constituency and his right to be free from unreasonable seizure.

REASONS FOR GRANTING THE WRIT

The First Circuit's Test For Assessing the Claim of Absolute Immunity Fails to Comport With the Functional Approach of This Court And Its Decision Conflicts with Other Circuits Which Have Acknowledged That The Allocation Of Funds Is A Core Legislative Activity.

Although in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-405 (1979), this Court extended absolute immunity to regional legislators for actions taken in their legislative capacity, it expressly reserved the question whether individuals performing legislative functions at the purely local level should be afforded absolute immunity from federal damages claims. Several appellate courts have relied on *Lake Country* in extending absolute immunity to local and municipal legislators. *See, e.g., Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (actions of city commissioner in approving budget decision to eliminate jobs were legislative acts and commissioners entitled to absolute immunity); *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983) (members of borough council and mayor who voted on ordinance protected by legislative immunity); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (village board of trustees entitled to absolute immunity for legislative action reducing the number of liquor licenses); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980) (county council members responsible for zoning ordinance afforded absolute immunity); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

The First Circuit has not yet decided whether local officials are entitled to claim absolute immunity as an

affirmative defense in the wake of *Lake Country*. The court declined to reach the issue in this case because it determined that, based on its "test for distinguishing between legislative and administrative activity," the Petitioner was acting in a "primarily administrative" capacity during the meeting in question.

Although "[t]his Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity," running through this Court's cases

> "with fair consistency, is a 'functional' approach to immunity questions. . . . Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions."

Forrester v. White, 108 S. Ct. 538, 544 (1988).

Once the individual's function is examined, the test for determining whether immunity attaches in a legislative context is whether the challenged activity was an integral or necessary element of the deliberative and communicative processes of the legislature. *See Gravel v. United States*, 408 U.S. 606, 625 (1972).

The First Circuit, however, failed to examine the nature of the overall functions with which the Petitioner, as presiding officer of the meeting, had been entrusted. As presiding officer, the Petitioner had the responsibility to maintain order. The presiding officer's job includes maintaining orderly discussion and debate, recognizing those who wish to speak, and requiring that speakers stick to the matter at hand and observe appropriate time

limitations. The presiding officer's discretionary judgments on these matters are the essence of legislative activity.

The chair, as presiding officer, is entitled to absolute immunity because the function of a chair is inherently legislative. The business taken up by the committee is immaterial to the chair's legislative function as a presiding officer. In any event, assuming arguendo, that the subject matter at hand is material, the lower courts have clearly erred in characterizing the issue at hand as "administrative."[3] As the First Circuit recognized, the question under discussion was " . . . whether, or how, the money could be found to cover the cost of hiring" seven individuals. App. 4. The qualifications of these teachers was not an issue. Other courts have recognized that budgetary decisions are a "quintessential legislative function, reflecting the legislators' ordering of policy priorities in the face of limited financial resources." *Herbst v. Daukas*, 701 F. Supp. 964, 968 (D. Conn. 1988), quoting *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (discussing elimination of position in budgetary process). *See also Spallone v. United States*, 110 S. Ct. 625, 631, 634 (1990). In *Rateree*, the Seventh Circuit, in affording absolute immunity to the city commissioners who approved a budget decision to eliminate jobs, stated that such decisions were "legislative, public policy choices that necessarily impact on the

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[3] The First Circuit in identifying the Petitioner's capacity as only "primarily," and not completely, administrative, thereby conceded that there were legislative aspects to the meeting. App. 4. The District Court had also concluded the meeting covered legislative items. App. 16.

employment policies of the government body. The political decision making inevitably involved in exercising budgetary restraint strikes at the heart of the legislative process and is protected legislative conduct."

The Petitioner in this case was acting in furtherance of his duties as the acting chair of the school committee meeting when he called the Respondent to order and subsequently ordered him removed from meeting. His discretionary act was an integral part of the legislative process and within the scope of his authority as the presiding officer.

"Every presiding office in a meeting must, at some time, make a spontaneous judgment as to whether a speaker is abusing the forum." *Collinson v. Gott*, 895 F.2d 994, 1005 (4th Cir. 1990) (Wilkinson, C.J. concurring). To hold the officer liable under § 1983 for such incidents "will not only create a vehicle for every disgruntled speaker to force his opponents into federal court; it will require local officials to second guess themselves every time they raise the gavel." *Id.* Indeed, this Court has recognized that the presiding officers of legislative bodies enjoy absolute immunity damages for injuries to and exclusion of members and others from their meetings. *See Dombrowski v. Burbank*, 358 F.2d 821, 825 (D.C. Cir. 1966), *aff'd on this ground sub nom Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (chairman of Senate Committee enjoyed absolute immunity from actions taken by him in that capacity); *Powell v. McCormack*, 395 U.S. 486 (1969) (damages could not be awarded against Speaker of the House).

The threat of personal liability for wielding a gavel in a heated meeting will create a disincentive for presiding officers to exercise the authority entrusted in them for maintaining order and ensuring that the business of the meeting is conducted. It will thereby jeopardize the flow of information presently available through the public meeting process. The presiding officer will likely become less concerned with monitoring the discussion of plans and policies than with avoidance of personal liability. As a result, the character and essence of such meetings will change if they are beset by litigation based on a presiding officer's single discretionary act. *See Collison v. Gott*, 895 F.2d at 1005-1011.

The power of the chair of a school committee to stop a disruptive argument and, after warning, to remove a disruptive member is analogous to the power of a trial judge to maintain order in the courtroom. The chair should similarly not incur personal liability in damages in exercising such authority, even if in hindsight it is determined to have been exercised incorrectly. The extension of absolute immunity to a chair of a local government body meeting is necessary because the risk of such an officer becoming entangled in litigation based on his role as chair is as likely as the risks associated with federal and state legislators and judges.

If, as the First Circuit has ruled, the Respondent may obtain damages because the Petitioner had him ejected and thereby infringed upon his First Amendment rights, the Respondent should also be able to claim damages on the ground that the chair improperly refused to recognize him or, having recognized him, cut him off before his time to speak had terminated, or wrongfully compelled

him to stick to the issue on the floor. It is precisely to preclude claims of this type that legislators have enjoyed absolute immunity in actions for damages.[4]

The First Circuit's Evaluation Of Subjective Factors In Deciding the Qualified Immunity Claim Conflicts with this Court's Objective Reasonableness Standard.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that "government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Under this standard, the focus of the inquiry generally is on the "objective reasonableness" of the official's conduct as measured by reference to "clearly established law." *Harlow v. Fitzgerald*, 459 U.S. at 818.

Despite *Harlow*, the First Circuit in this case upheld the denial of summary judgment based upon qualified immunity because it concluded that the Respondent had raised factual questions bearing on the reasonableness of the Petitioner's conduct in having the Respondent removed from the meeting. App. 7-8. Pursuant to *Harlow*, however, the issue is not whether the Petitioner's conduct

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[4] Although it is an obvious point, it bears remembering that immunity under 42 U.S.C. § 1983 means only immunity from paying damages and is not a bar to relief by way of injunction, specific performance, or declaratory judgment. *See Powell v. McCormack*, 395 U.S. 486, 517-18 (1969) (declaratory relief was appropriate to resolve the plaintiff's right to a seat in Congress where he was seeking "neither damages from any of the respondents nor a criminal prosecution").

was in fact reasonable but whether a reasonable person in the Petitioner's position would have thought that the conduct was reasonable; namely, whether a reasonable person would have found the Respondent disruptive and would have ordered his removal from the meeting. Here, therefore, even if the Petitioner was mistaken[5] in thinking that his action was justified as a "reasonable" time, place and manner restriction authorized by the law, his perception may nevertheless have been an objectively reasonable one under the circumstances. *See Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 3041 (1987). The reasonableness of the official's conduct in this regard is, under *Harlow*, clearly one of objective, not subjective, reasonableness. The First Circuit erred in concluding that the question of whether the Petitioner reasonably relied on or complied with the statute and/or rules precluded the entry of summary judgment for the Petitioner. The Petitioner's conduct was objectively reasonable and the court should have afforded him the protection of qualified immunity.

In addition, the First Circuit determined that the Respondent's questioning of the Petitioner's motives for ordering his removal precluded the entry of summary judgment in favor of the Petitioner. App. 7-8. More particularly, the court found that the Respondent questioned

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[5] Immunity covers more than mere error in judgment. As this Court recently stated under the rationale for immunity, " . . . [I]t is better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant threat of retaliation." *Burns v. Reed*, 111 S. Ct. 1934, 1938 (1991), citing *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976).

(1) whether the Petitioner "acted out of some personal animosity toward him" and (2) whether the Petitioner's motive was actually to suppress the particular content of his speech. App. 7-8. The Respondent did not allege either of these bases in his complaint.

By shifting the focus of the qualified immunity inquiry to an objective standard in *Harlow*, this Court sought to shield government officials from the substantial costs that attend "[j]udicial inquiry into subjective motivation," particularly "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *See Harlow v. Fitzgerald*, 457 U.S. at 817. This Court's "objective" test was adopted in large part to avoid the impediment to early resolution caused by questions regarding the officer's subjective state of mind by making irrelevant to the immunity inquiry any question of an official's bad faith or subjective perceptions. See *id.* at 815-819. "Reliance on the objective reasonableness of an official's conduct . . . should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. *Id.* at 818. Thus, under *Harlow*, an objective immunity analysis at the summary judgment stage would not include consideration of subjective factors, such as intent. The First Circuit's decision in this case clearly does not comport with the objective reasonableness standard of this Court.

Some circuits have since held that *Harlow* does not preclude them from considering subjective factors in assessing qualified immunity claims where the official's state of mind is an essential element of the constitutional right allegedly violated. *See, e.g., Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 647-648 (10th

Cir. 1988); *Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988). *See also Branch v. Tunnell*, ___ F.2d ___, 1991 W.L. 111424 (9th Cir. 1991).

In *Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir. 1989), however, the Eighth Circuit did not consider the subjective motivation of the arresting officers in the case before it, despite the dissent which argued that the subject arrest may have been in retaliation for the defendant having advised someone only to speak to a lawyer. The *Gorra* court stated that "[u]nder the [*Harlow*] 'objective reasonableness standard,' courts are not to delve into the subjective motivation of the arresting officer. *Gorra v. Hanson*, 880 F. 2d at 97. *See also Elbrader v. Blevins*, 757 F. Supp. 1174, 1183 (D. Kan. 1991), citing *Gorra v. Hanson*, 880 F.2d 95 (8th Cir. 1989).

This Court, however, has not explicitly addressed the conflict as to whether the *Harlow* standard should be modified whenever a plaintiff questions the governmental actor's intent or motive.[6] Given the apparent conflict between Harlow's emphasis on "objective reasonableness" and those cases in which the circuit courts have determined that subjective elements, such as motive or intent, warrant consideration, this Court

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[6] Although, as discussed further *infra*, this Court granted certiorari in the case of *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), in which the D.C. Circuit Court of Appeals had considered the sufficiency of the plaintiff's allegations of motivation on the defendant's claim of qualified immunity, the majority of the Court did not address that issue, instead affirming the decision on the ground that the plaintiff had not alleged a violation of a clearly established constitutional right. *Siegert v. Gilley*, 111 S. Ct. 1789 (1991).

should grant certiorari to clarify the analytical structure under which claims of qualified immunity should be addressed in those cases in which improper motivation are elements of the alleged constitutional violation. The same considerations and concerns relating to the excessive disruption of government which prompted the Court to abolish the subjective element in the qualified immunity context in the first instance warrant the continuation of that standard.

These considerations are expressly compelling to the Petitioner where the Respondent failed to establish that he had a right *not* to be ejected from the meeting in question. Indeed, there is no such right.

This Court, in *Kilbourn v. Thompson*, 103 U.S. 168, 189-190 (1880), stated *in dictum*:

> "As we have already said, the Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order."

See also Powell v. McCormack, 395 U.S. at 548 (Congress has interest in preserving institutional integrity which can be sufficiently safeguarded by exercise of its power to punish its members for disorderly behavior).

In fact, the Petitioner's actions were expressly authorized by the Massachusetts Open Meeting Law, Mass. Gen. L. ch. 39, § 23C, and clearly sanctioned by an analogous statute dealing with the Town moderator, whose powers have been recognized in the Commonwealth of

Massachusetts for more than two centuries. *See* Mass. Gen. L. ch. 39, § 17. The Open Meeting Law gave Petitioner, as presiding officer of the school committee meeting, the discretionary authority to remove an individual from that meeting for disorderly behavior. Massachusetts has long had the analogous statute, G. L. c. 39, § 17, providing similar authority to the moderator of a Town meeting. *See Doggett v. Hooper*, 306 Mass. 129, 27 N.E.2d 733, 739 (1940) ("The powers and duties of a moderator have been fixed by law for more than two centuries . . . [and] are set forth in G.L. c. 39, §§ 15 and 17. . . . "). Indeed, the language of § 17 and § 23C closely track each other.

The moderator's powers were authoritatively construed in *Doggett v. Hooper, supra*, in which the plaintiff, an elected Town meeting member, was addressing a Town meeting when the moderator ruled him out of order and requested that he be seated. *Doggett v. Hooper*, 306 Mass. at 130, 27 N.E.2d at 739. After the plaintiff ignored the moderator's repeated requests that he be seated or leave the hall, the moderator ordered the plaintiff removed, and a police officer escorted him out of the hall, confining him in a room. In ruling for the moderator in a false imprisonment claim, the Massachusetts Supreme Judicial Court stated that "the plaintiff was disorderly if he failed to observe the ruling of the moderator on a question of order." *Id.*

As the First Circuit recognized, the petitioner

> "attempted to restore order to the meeting by banging his gavel several times and by issuing the following warnings: 'I'm not going to continue on with this screaming debate.' 'You want

> to discuss it, discuss it. You want to start yelling, I won't put up with it.' Barletta's warnings went unheeded." App. 1.

Although conceding the constitutionality of the Open Meeting Law as a reasonable restriction, the First Circuit nonetheless has permitted a factual question to be presented for the jury's consideration essentially based upon the Respondent's assertion that (1) the Petitioner bore him personal animosity and (2) other presiding officers had not ejected disruptive persons in the past. As to the first point, it bears observing that the Everett School Committee, as almost all school committees in Massachusetts and many throughout the country, is an elected school committee. In this circumstance, the presiding officer will have frequently been an opponent of other member(s) of the committee. It is always possible to contend that the presiding officer has made a decision in his role as presiding officer because of some improper motive. To permit qualified immunity to be defeated on this basis essentially eliminates it as a defense for which summary judgment can be obtained.

As to the second point, it is similarly always possible to assert that a discretionary decision to remove a person (or not recognize the speaker, or, having recognized him, to have cut him off before he is finished) was different than those of prior presiding officers. Inherent in the exercise of discretionary power is the fact that some officials will choose to exercise it on certain occasions and others in similar circumstances will not. To permit qualified immunity to be defeated on this basis erases it as a defense to damage claims under § 1983.

CONCLUSION

For these reasons, Petitioner requests this Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

Ronald J. VACCA, Plaintiff, Appellee,

v.

David BARLETTA,
Defendant, Appellant.

No. 91-1001.

United States Court of Appeals,
First Circuit.

Heard April 2, 1991.

Decided May 9, 1991.

Before BREYER, Chief Judge, and TORRUELLA and CYR, Circuit Judges.

TORRUELLA, Circuit Judge.

During the August 29, 1988, meeting of the Everett (Massachusetts) School Committee, Committee Member Ronald Vacca aggressively challenged Superintendent Frederick Gibson regarding the allocation of $151,000 for the purpose of filling seven vacant teaching positions. Vice-Chairperson David Barletta was acting Chairperson in the regular Chairperson's absence. Barletta took exception to the tone used by Vacca in addressing Gibson. He attempted to restore order to the meeting by banging his gavel several times and by issuing the following warnings: "I'm not going to continue on with this screaming debate." "You want to discuss it, discuss it. You want to start yelling, I won't put up with it." Barletta's warnings went unheeded. Barletta responded by informing Vacca that if he did not stop he was "going to have an early night," to which Vacca replied "I know . . . go ahead." At that point Barletta called a five minute recess and

requested that Assistant Superintendent Frederick Foresteire have Vacca removed. After five minutes, the recess ended, Barletta, Vacca and Gibson returned, and discussion resumed. Very shortly thereafter, however, three Everett police officers arrived and, amidst protests, physically dragged the still seated Vacca from the room. Vacca was then handcuffed and removed to the local police station where he was detained for a period of approximately 45 minutes. The meeting was adjourned for lack of a quorum.[1]

As a consequence of Vacca's treatment at the School Committee meeting, Vacca sued Barletta[2] under the following theories of liability: (1) violation of his first amendment rights under 42 U.S.C. § 1983; (2) violation of the corresponding Massachusetts Civil Rights Law, Mass.Gen.Laws ch. 12, § 11I (1990); and (3) intentional infliction of emotional distress. Barletta claimed absolute, or in the alternative qualified, immunity and moved for summary judgment. The district court refused to grant absolute immunity. With regard to Barletta's assertion of qualified immunity, the district court determined that material issues of fact remained in dispute and therefore summary judgment was inappropriate. 753 F.Supp. 400. Barletta appealed. We affirm.

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[1] Vacca was not the only member no longer present. Two additional members did not return after the recess.

[2] Vacca also sued the City of Everett and the three police officers, Robert Basteri, Paul Mazzi and Anthony Andrulli, who removed him from the meeting. We are only concerned with Barletta in this appeal.

ABSOLUTE IMMUNITY

This court has not decided whether local officials are entitled to claim absolute immunity as an affirmative defense. *See Cutting v. Muzzey*, 724 F.2d 259, 261-62 (1st Cir.1984). We need not reach that issue in this appeal. It is well established that for absolute immunity to attach, the individual must have been acting in a legislative rather than administrative capacity. *Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506, 519 n.11 (1st Cir.1987); *Agromayor v. Colberg*, 738 F.2d 55, 58 (1st Cir.), *cert. denied*, 469 U.S. 1037, 105 S.Ct. 515, 83 L.Ed.2d 405 (1984); *Aitchison v. Raffiani*, 708 F.2d 96, 99 (3d Cir.1983). The test for distinguishing between legislative and administrative activity is two-fold:

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decisionmaking are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on the "particularity of the impact of the state of action." If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

Cutting, 724 F.2d at 261 (quoting *Developments in the Law – Zoning*, 91 Harv.L. Rev. 1427, 1510-11 (1978)). The discussion at the time of Vacca's outburst involved the hiring of seven specific individuals. Although the particular exchange at issue involved budgetary concerns (which

Barletta argues are legislative matters), it was clear in context that the parties were simply discussing whether, or how, the money could be found to cover the cost of hiring those particular individuals. The district court therefore correctly determined that Barletta was exercising a primarily administrative function and consequently is not entitled to absolute immunity. Thus, since Barletta's action was one which would not in any event qualify as a legislative act, we need not decide in this case whether he is entitled to the absolute immunity granted in the exercise of legislative functions.

QUALIFIED IMMUNITY

"[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The question becomes, therefore, whether Vacca had a constitutional or statutory right to speak at the School Committee meeting, and, if so, whether a reasonable person in Barletta's circumstances would have been aware that his actions violated that right.

It is undisputed that "free discussion of governmental affairs" lies at the heart of the first amendment. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77, 98 S.Ct. 1407, 1415-16, 55 L.Ed.2d 707 (citing *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484 (1966)). Freedom of speech, however, is not absolute at all

times and under all circumstances. *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 2499, 101 L.Ed.2d 420 (1988). Even protected speech may be restricted to a reasonable time, place and manner. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). Such restrictions "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.*

Barletta's claim to qualified immunity rests upon the Massachusetts Open Meeting Law and the Rules of the Everett School Committee, both of which contain valid "manner" restrictions designed to maintain order during committee meetings. The Massachusetts Open Meeting Law provides:

> No person shall address a public meeting of a governmental body without permission of the presiding officer at such meeting, and all persons shall, at the request of such presiding officer, be silent. If, after warning from the presiding officer, a person persists in disorderly behavior, said officer may order him to withdraw from the meeting, and, if he does not withdraw, may order a constable or any other person to remove him and confine him in some convenient place until the meeting is adjourned.

Mass.Gen.Laws ch. 39 § 23C (1988). Similarly, the Rules of The Everett School Committee describe the duties of the chairperson as follows:

> The Chairperson shall call the meeting to order; preside over the proceedings to ensure conformance with the Rules of the Committee and

> Parliamentary Procedure; promptly make all rulings required in accordance with the office of Chairperson; and provide for the safety of all persons in attendance at duly called meetings. In this latter respect, the Chairperson shall have the authority to order the ejection of any and all persons acting in a disorderly or disruptive manner, and require that the person or persons be conveniently held at a place apart from the meeting until the meeting has been adjourned.

Rules of the Everett School Committee, ch. IV, § 1 [hereinafter "Rules"].

Vacca, however, maintains that neither provision applies to the series of events which took place at the August 29 meeting. First, he notes that the Open Meeting Law clearly states that it is a regulation of participation by the *public*, not elected officials, at open meetings. Mass.Gen.Laws ch. 39, § 23C (1988). Thus he contends that it was unreasonable for Barletta to believe that the Open Meeting Law applies to duly elected officials.

Second, Vacca notes that the duty of the Chairperson under the Rules of the Everett School Committee to eject disorderly and disruptive persons is tied to the duty of the Chairperson to provide for the safety of all persons in attendance. Rules, ch. IV, § 1. Vacca therefore maintains that it was only appropriate for Barletta to eject individuals who were threatening the safety of others. Since, there has been no allegation that Vacca's behavior was posing a threat to anyone's safety, Vacca contends that Barletta's reliance on the School Committee Rules was likewise unreasonable.

We do not find it necessary to resolve this dispute. The issue of qualified immunity turns solely on whether

the restrictions placed upon Vacca by Barletta were reasonable under the particular circumstances. *Rakovich v. Wade*, 850 F.2d 1180, 1202 (7th Cir.), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988) ("Although the qualified immunity determination is a legal question, it is not to be answered in the abstract but in reference to the particular facts of the case."). Whether or not Barletta acted in accord with the Open Meeting Law and/or the Rules, which is itself disputed, is at most evidence as to whether Barletta acted reasonably. Moreover, Vacca raises several other questions of fact which bear on the reasonableness of Barletta's actions. *Petitti v. New England Tel. And Tel. Co.*, 909 F.2d 28, 31 (1st Cir.1990) (summary judgment is inappropriate "if there are any factual issues that need to be resolved before the legal issues can be addressed").

Vacca disputes whether Barletta followed the recognized parliamentary procedure historically employed by the School Committee Chairperson for calling disorderly and disruptive persons to order and hence whether Barletta's actions were reasonable. In addition, he questions Barletta's motives for ordering his removal. *See Rakovich*, 850 F.2d at 1211 (intent may be considered in determining whether the conduct set out a constitutional violation). His allegations regarding motive are two-fold. First, he alleges that Barletta may have acted out of some personal animosity toward him. He maintains that prior School Committee meetings also involved "heated" disputes but did not result in the ejection of any participating members. More to the point, he questions why Gibson, who was an equally vocal participant in the debate, was not

similarly removed. Second, he questions whether Barletta's motive was actually to suppress the particular content of his speech, rather than to impose a content-neutral, and hence constitutional, manner restriction. He notes that during the verbal altercation between Gibson and himself, Barletta stated that he would not countenance such "accusations" and took exception to Vacca's use of the words "boondoggling" and "snowing."

Upon review of the evidence,[3] including a video tape that the parties stipulated that we consider, which we view in the light most favorable to Vacca, *see id.* at 1205 (the regular summary judgment standard applies in qualified immunity cases); *see also Villanueva v. Wellesley College*, 930 F.2d 124, 127 (1st Cir.1991) (upon review of summary judgment "we view all the facts in the light most favorable to the non-moving party and indulge all inferences advantageous to that party"), we find that Vacca's allegations raise genuine issues of fact. Because material issues of fact are in dispute, the district court correctly denied summary judgment.

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[3] Judge Torruella is of the view that this court should not review evidence on appeal which was not first presented to the trial court. *See United States v. Bayko*, 774 F.2d 516, 520 (1st Cir.1985) ("Normally, all issues and facts to be considered on appeal should first have been put to the lower court.") In this particular case, however, the court's decision to view the video tape does not materially affect Judge Torruella's ultimate determination regarding summary judgment. Thus Judge Torruella does not deem it necessary to substantively disagree with the decision of this court.

CONCLUSION

For the reasons stated above, the district court order is hereby *affirmed*.

Ronald J. VACCA, Plaintiff,

v.

David BARLETTA, et al., Defendants.

Civ. A. No. 89-1669-S.

United States District Court,
D. Massachusetts.

Dec. 12, 1990.

ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

SKINNER, District Judge.

This case arises out of a meeting of the Everett School Committee on August 29, 1988. The plaintiff, Ronald J. Vacca, and the defendant, David Barletta, are two elected members of the committee. Mr. Barletta was the acting chairperson of the committee on August 29, 1988. After an argument about the hiring of seven teachers for the upcoming school year, Mr. Barletta asked the assistant superintendent to call the police to ask them to remove Mr. Vacca from the meeting. Three police officers, defendants Basteri, Mazzi, and Andrulli, removed Mr. Vacca from the meeting, and held him in custody at the police station for about an hour.

The plaintiff has sued David Barletta, the three police officers, and the City of Everett for violations of his civil rights and for the intentional infliction of emotional distress. The City of Everett and David Barletta have moved for summary judgment on all of the counts pending against them.

City of Everett's Motion for Summary Judgment

In Count XX of his complaint, the plaintiff alleges that the City of Everett is liable for negligent infliction of emotional distress through the actions of Mr. Barletta and the three police officers. Count XX realleges four previously stated counts: negligent infliction of emotional distress by Barletta, Basteri, Mazzi, and Andrulli.

The plaintiff does not allege that the City adopted any policy, ordinance, regulation, or custom that resulted in a constitutional deprivation. The plaintiff, therefore, has not stated a claim against the City under § 1983. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978). Since the only count involving the City is a state claim, the City is a pendent party.

In *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), the Supreme Court refused to allow the plaintiff to add the county as a pendent party. The plaintiff had filed suit against the County Treasurer and county commissioners under § 1983. At the time *Aldinger* was decided, counties could not be named as defendants in § 1983 actions. The plaintiff sought, therefore, to assert claims against the county under state statutes providing for vicarious liability arising out of the torts of county officials. The Court held:

> As we have indicated, we think a fair reading of the language used in § 1343, together with the scope of § 1983, requires a holding that the joinder of a municipal corporation, like the county here, for purposes of asserting a state

> law claim not within federal diversity jurisdiction, is without the statutory jurisdiction of the district court.

427 U.S. at 17, 96 S.Ct. at 2421-22.

Two years after *Aldinger* was decided, the Court held that municipalities could be considered "persons" within the meaning of § 1983 if the action that is alleged to be unconstitutional implements a governmental policy or custom. *See Monell,* 436 U.S. at 690-91, 98 S.Ct. at 2035-36. The basic holding of *Aldinger,* however, is still good law. *See Owen Equipment and Erection Co. v. Kroger,* 437 U.S. 365, 372 n. 12, 98 S.Ct. 2396, 2402 n. 12, 57 L.Ed.2d 274 (1978); *Neptune v. McCarthy,* 706 F.Supp. 958, 960 (D.Mass.1989). Following the logical conclusion of *Aldinger,* combined with *Monell,* some courts have held that in a suit against city employees, the city cannot be joined as a pendent party unless there is an allegation of a municipal policy or custom that would make the city liable directly under § 1983. *See Locust v. Degiovanni,* 485 F.Supp. 551 (E.D.Pa.1980); *Christensen v. Phelan,* 607 F.Supp. 470 (D.Colo.1985). *See also* 13B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3567.2. Under *Aldinger,* therefore, I cannot exercise pendent jurisdiction over Count XX.

David Barletta's Motion for Summary Judgment

Mr. Barletta has moved for summary judgment on Counts I, II, and III of the complaint. Count I alleges a violation of 42 U.S.C. § 1983; Count II alleges a violation of the Massachusetts Civil Rights Act; and Count III alleges intentional infliction of emotional distress.

Count I

Count I alleges that on August 29, 1988, Mr. Barletta, acting under color of law, violated the plaintiff's right of free speech, right to represent his constituents, and right to be free from unreasonable seizures of his person.

Absolute Immunity

The defendant claims that as a presiding officer of a school committee, he is entitled to absolute immunity. He asserts that the primary function of the Everett school committee is legislative.

The United States Supreme Court has held that federal, state, and regional legislators are entitled to absolute immunity from federal damages suits for actions taken in their legislative capacities. *See Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973); *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). The Court has not decided whether individuals performing legislative functions at the local level should be granted absolute immunity. *Lake Country Estates*, 440 U.S. at 404 n. 26, 99 S.Ct. at 1178 n. 26. Several courts of appeal have extended absolute immunity to local and municipal legislators. *See, e.g., Hernandez v. City of Lafayette*, 643 F.2d 1188, 1192-93 (5th Cir.1981), *cert. denied*, 455 U.S. 907, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir.1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982). Our court of appeals has not resolved the issue of absolute immunity for local officials. *See Cutting v. Muzzey*, 724 F.2d 259, 261-62 (1st Cir.1984). *But see Latino*

Political Action Committee, Inc. v. City of Boston, 581 F.Supp. 478, 482 (D.Mass.1984) (holding that, to the extent that they are acting in their legislative capacities, Boston's Mayor and City Council members are absolutely immune from suits for damages, injunctive relief, or declaratory relief under § 1983).

It is not necessary for me to address the question of whether to extend absolute immunity in this case. School committees in Massachusetts have been given general powers over public schools. *See Braintree Baptist Temple v. Holbrook Public Schools*, 616 F.Supp. 81, 89 (D.Mass. 1984). By statute, school committees "shall make all reasonable rules and regulations, consistent with law, for the management of the public schools of the city and for conducting the business of the committee." 43 M.G.L. § 33. 71 M.G.L. § 37 gives the school committees "general charge of all the public schools. . . . " including some legislative powers.

The relevant inquiry, however, is whether during the meeting of August 29, 1988 the school committee members were acting in a legislative capacity. "[W]e look to the function the individual performs rather than his location within a particular branch of government." *Aitchison v. Raffiani*, 708 F.2d 96, 99 (3rd Cir.1983). Our court of appeals has adopted a two-pronged test for distinguishing between legislative and administrative activity:

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts", such as "generalizations concerning a policy or state of affairs", then the decision is legislative. If the facts used in the decisionmaking are more specific, such as those

> that relate to particular individuals or situations, then the decision is administrative. The second test focuses on the "particularity of the impact of the state of action". If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others", it is administrative.

Cutting v. Muzzey, 724 F.2d at 261 (quoting *Developments in the Law – Zoning*, 91 Harv.L.Rev. 1427, 1510-11 (1978)).

To determine whether the Everett school committee was acting in a legislative or administrative capacity on the evening of August 29, 1988, I look to the Minutes of the Everett School Committee Meeting, August 29, 1988 (Plaintiff's Exhibit A) and the Transcript of the Relevant Portions of the Videotape of the Everett Community Television of the Everett School Committee of August 29, 1988 (Plaintiff's Exhibit C). The minutes list the many items that were discussed in the meeting. The items are largely administrative issues affecting individuals, rather than general policy matters. The items listed include: the appointment of the English Department Head; the salary for substitute custodians; the matter of part-time clerical help at the Centre School; the appointment of an individual as a teacher in the Everett Public Schools; the amending of the Rules and Regulations to allow a public forum at each School Committee meeting; the acceptance of two teachers' resignations; a request by a teacher for maternity leave; a request by a school principal for permission to have students visit Washington, D.C.; and a request from the Everett Playgroup for permission to use an available classroom.

Although a few of these items appear to be legislative, such as amending the Rules and Regulations, the topics discussed at the meeting were primarily administrative. Moreover, the issue being discussed during the dispute between Mr. Barletta and other committee members was the hiring of seven specific individuals as teachers. (Transcript of Videotape; Barletta Dep. at 107) Since Mr. Barletta was exercising a primarily administrative function during the meeting, he is not entitled to absolute immunity under § 1983.

Qualified Immunity

Government officials who are not granted absolute immunity are entitled to qualified immunity from suit. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Whether a defendant will be granted qualified immunity is a question of law, appropriate for resolution at the summary judgment stage:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."

Harlow v. Fitzgerald, 457 U.S. at 818-19, 102 S.Ct. at 2738.

Since the defendant has moved for summary judgment, I must view the record in the light most favorable to the plaintiff and indulge all inferences in his favor. *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 105 (1st Cir.1988). According to Mr. Vacca, during the meeting of August 29, 1988, he was questioning Superintendent Gibson about funds available for the hiring of teachers for the upcoming school year. (Transcript of Videotape, Barletta Dep. at 107) Mr. Vacca had been given the floor to speak by Mr. Barletta. (Barletta Dep. at 109) The only words used by Vacca that Barletta found offensive were "boondoggle" and "snowing," referring to the actions of Superintendent Foresteire. (Barletta Dep. at 130) Apart from his manner of speaking, the only behavior Barletta objected to was Vacca's shaking his index finger while he was talking. (Barletta Dep. at 128)

I find that, making all inferences in the plaintiff's favor, Barletta violated Vacca's clearly established constitutional rights of free speech, to represent his constituents, and to be free from unreasonable seizures. The Supreme Court has stated:

> The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 [84 S.Ct. 710, 720, 11 L.Ed.2d 686] (1964), is that "debate on public issues should be uninhibited, robust, and wide-open." . . . Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and

> the implementation of it must be similarly protected. . . . Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.

Bond v. Floyd, 385 U.S. 116, 135-37, 87 S.Ct. 339, 349-50, 17 L.Ed.2d 235 (1966).

Bond involved the refusal of the Georgia House of Representatives to seat Julian Bond because of his statements about the government's Vietnam policy. Although *Bond* involved a state legislature, its reasoning applies equally to a local school committee. The Court in *Bond* stated in dicta that if the statements in question had been made by a private citizen, they would have been protected by the first amendment. 385 U.S. at 135, 87 S.Ct. at 349. A reasonable person acting as chairperson of a public meeting would know that a member of an elected body has a constitutional right to speak on public issues. Under *Bond*, this right is part of the duty to represent one's constituents. "A finding that the law was clearly established renders an inquiry into good faith irrelevant." *Miller v. Town of Hull, Mass.*, 878 F.2d 523, 534 (1st Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 501, 107 L.Ed.2d 504 (1989) (denying qualified immunity to members of town board of selectmen who violated the first amendment rights of members of town redevelopment authority by discharging them because of their approval of a subsidized housing project for the elderly). Taking all inferences in favor of the plaintiff, Mr. Barletta violated Mr. Vacca's clearly established constitutional rights.

Whether Mr. Barletta actually violated Mr. Vacca's constitutional rights, or whether he merely exercised his right to implement a valid time, place, and manner restriction, will be decided at trial.

Count II

Count II alleges that Mr. Barletta's actions on August 29, 1988 violated the Massachusetts Civil Rights Act, M.G.L. c. 12, § 11*I*. The Massachusetts Civil Rights Act provides a remedy for any person whose exercise of federal or state rights has been interfered with "by threats, intimidation, or coercion." M.G.L. c. 12, § 11*H*. Mr. Barletta instructed the assistant superintendent to call the police. When the police arrived, Mr. Barletta asked them to remove Mr. Vacca from the meeting. (Barletta Dep. at 152-53, 156) There is a material issue of disputed fact as to whether Mr. Barletta's actions constituted a deprivation of Mr. Vacca's first amendment rights by threats, intimidation, or coercion. *See Miller v. Town of Hull, Mass.*, 878 F.2d at 533 (members of town board of selectmen violated the Massachusetts Civil Rights Act when they discharged members of the town redevelopment authority for speaking out and voting for a project to which the board was opposed).

Count III

Count III alleges that Mr. Barletta's actions constituted intentional infliction of emotional distress. The Supreme Judicial Court of Massachusetts has set out the standard for intentional infliction of emotional distress:

> We have placed reckless and intentional infliction of emotional distress in the same category. We have not made physical harm an essential element of such a claim. If a defendant intended to inflict emotional distress or knew or should have known that emotional distress was a likely consequence of his conduct, if his conduct was extreme and outrageous . . . , and if his conduct caused the plaintiff severe emotional distress, we would impose liability.

Nancy P. v. D'Amato, 401 Mass. 516, 517 N.E.2d 824, 827 (1988) (citations omitted).

Mr. Vacca did not suffer any physical injury as a result of being removed from the meeting, and sought no medical of psychiatric treatment after the incident. (Plaintiff's Answers No. 5 and 17 to David Barletta's First Set of Interrogatories) Mr. Vacca claims, however, that he did suffer:

> the embarrassment and humiliation of being physically removed from a meeting in front of the public sector of Everett, including my constituents and all of the City's residents who were viewing this incident on the Everett Cable television channel. In addition, this incident was viewed by a greater audience when it was aired on Channel 7 later that evening. I also suffered the embarrassment and humiliation of being hand-cuffed in public and placed in a police wagon and the further embarrassment and humiliation of being placed in a cell at the police station with other prisoners as though I were a common criminal.

(Plaintiff's Answer No. 4 to David Barletta's First Set of Interrogatories) Whether Mr. Barletta knew that having the police remove Mr. Vacca from a public meeting would cause him severe emotional distress is a question of fact

which I cannot determine on this motion. There are also genuine issues of material fact as to whether Mr. Barletta's actions were extreme and outrageous and as to whether Mr. Vacca's emotional distress was severe.

Accordingly, the motion for summary judgment by the defendant City of Everett on Count XX is allowed. The motion for summary judgment by the defendant David Barletta on Counts I, II, and III is denied.

TRANSCRIPT OF RELEVANT PORTIONS
OF SCHOOL COMMITTEE MEETING

[BEFORE FIRST CIRCUIT COURT OF APPEALS,
RECORD APPENDIX PAGES 196-202]

[p. 196] UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

RONALD J. VACCA, Plaintiff	)	
v.	)	CIVIL ACTION
DAVID BARLETTA, RICHARD E. BASTERI, PAUL N. MAZZI, ANTHONY ANDRULLI and THE CITY OF EVERETT	)	NO. 89-1669-S
Defedants [sic]	)	

AFFIDAVIT OF ANN MARIE MONZIONE

I, Ann Marie Monzione, attorney for the Plaintiff, Ronald J. Vacca, do hereby state and aver the following:

That the Transcript of relevant portions of the Videotape of the Everett Community Television of the Everett School Committee of August 29, 1988 is a true and accurate transcription of the audible audio portions of that videotape.

Signed under the pains and penalties of perjury this 19th day of November, 1990.

Ann Marie Monzione

[p. 197] Man: Present – Mr. Hart, Mr. Kelly. Also present was ? Member, Mr. Suchetta, Mr. Vacca, Mr. Barletta and Superintendent of Schools, Mr. Gibson. Number one – *Teachers recommended for appointment.* It was moved to recommend to the full board the appointment of Carolann Hills to the position of City Reading ?. Do I have to put that in the following Motion?

Vacca: (Inaudible). My question very simply is directed at the Superintendent. A month ago, you asked us to bring back 14 teachers and (inaudible) where the money was going to come from and we ended up at that time and said that we were going to be 75,000 (inaudible) between September and June. Part of that was the $152,000.00 of the EEOG money (inaudible) $17,000.00 back. I'm very curious (inaudible) recommended here tonight to extend another $151,000.00 to hire, to bring back to the board 7 teachers. I'm very curious as to where we're going to get that $151,000.00 plus the 75 plus the 17 before (inaudible). I'd like to know where the money's coming from.

S.G.: From the budget.

Vacca: Where in the budget?

S.G.: The paychecks (Inaudible). Carolann Hill is a called a grant-taker. We couldn't fill the position with (inaudible) notification tonight. But, in the meantime, we have (inaudible) she had requested to go from the reading position she had to special ed. So, Carolann Hill has been brought back into the City Reading to a position for the

teacher who is in the budget who has now gone to a special ed budget. So, the money that was in the City Budget is still there and will be taken up by Carolann Hill. One goes into special ed to create a new position (inaudible) and that girl has been (inaudible) into special ed. The position she has taken is a girl who was on special ed who is now going on to Kindergarten where that position had been covered.

Vacca: No, I don't want to take the (inaudible) I want to be able to justify to my own mind and I'd be happy to justify to the public – 5 weeks ago, you came before the school board and asked us to bring back 14 teachers and you said, in essence, you didn't have the money. However, this is where I could get it. I could take $100,000.00 out of substitute teachers account. I could use $152,000.00 on the EEOG. We're going to get $15,000 from past federal programs and we're gonna get $19,000 and change from federal impact and you were short $75,000. I'm very curious because we talked, we have [p. 198] covered this but it still bothers my mind that five weeks ago, you came to us and said, "You know, we don't have any money but we need these teachers and we (inaudible) $75,000 in the hole". I mean, tonight, you're asking us to spend another $151,000.

Gibson: Well, let's back up a little at this time. (inaudible) I said that we're gonna be $75,000 in the hole. I said I think I could get us another $75,000 but I think I can find that by the teachers who have retired, the teachers who have

resigned and are still carried in the budget and I think we'll be able to pick it up from them. Now, you know as well as I do that there should be the money within the budget depending on who's in, who's out, who goes from here (inaudible). The money is there. If the money isn't there, take me apart in April and May. But the money is there to pay (inaudible) and you know it as well as I do.

Vacca: I understand that, Mr. Gibson . . .

Gibson: Then, why ask questions about it?

Vacca: Because, very simply, Mr. Gibson, my statement was made . . .

Gibson: You just said you know where it is so why don't you say the hell where it is. Why do you say, "It boggles my mind. I don't know where it is."

Vacca: Because you're the one that said we didn't have money, Mr. Gibson and what I'm saying is . . .

Gibson: You came in today and told the guy we had 600,000 in the budget . . .

Vacca: That's right.

Gibson: (inaudible) Am I?

Vacca: Yes.

Gibson: Then, what are you worried about?

Vacca: Because I want to know where your figures are when you came in . . .

(loud arguing in the background)

Vacca: Mr. Chairman, Mr. Chairman, I have my own.

Barletta: If you're gonna start yelling, I'm not gonna put up with [p. 199] it.

Vacca: Mr. Chairman, Mr. Chairman . . .

Gibson: Throw me out! He's wasting all our time.

Vacca: Mr. Chairman, I have my compilations.

(loud arguing in the background)

Vacca: Five weeks ago, Mr. Gibson came to us, crying poverty. And now, all of a sudden . . .

Gibson: I didn't cry poverty. I didn't cry poverty. I said I could handle it.

Barletta: I'm gonna do something in a minute. I'm not gonna like to do it, but . . .

Gibson: You're getting to be a disgrace to the city the way you keep . . . (?)

(loud arguing in the background)

Vacca: No, Mr. Gibson, you're getting to be a disgrace.

Gibson: Good! Good!

Vacca: You came to us 5 weeks ago crying poverty and now you're coming in saying you've got $151,000.

Gibson: (inaudible) getting $85.00 back.

Vacca: Despite the fact that you were gonna let 55 teachers go last February.

Gibson: And now they're gone.

Vacca: They're not gone. They're all coming back. But, you played a game.

Barletta: Call the Meeting to order. (gavel bangs 2x) Order.

Barletta: If you want to make accusations go down to Everett Square.

Gibson: It don't come out your way so everything's a loss.

(loud arguing in the background)

Vacca: No, Mr. Gibson. All I want is to know . . .

[p. 200] Barletta: I don't want you making any more accusations. If you have something to discuss look at, please.

(loud arguing in the background)

Barletta: I'm not going to continue on with this screaming debate and that's all.

Vacca: I have statements . . .

Barletta: If you're gonna sit here and go back and forth and do this name calling, I'm not gonna put up with it. I'm gonna call a recess and then I may do something else. That's all.

Vacca: Mr. Chairman, this school committee has an obligation to the students . . .

Chairman: We don't need the lecture.

Vacca: Mr. Chairman, can I speak? I have the floor now.

Chairman: You can speak but you're not gonna make accusations.

(loud arguing in the background)

Chairman: We know we have obligations, Mr. Vacca. (inaudible). Do not make accusations.

Vacca: I am speaking on the subject at hand. We're being asked here tonight to

spend $151,000. Five weeks ago, we were told we were $75,000 in the hole. Now, I have done my numbers and I said 5 weeks ago, I had no problem in voting for those people because I was satisfied that the money was there and I'm still satisfied that the money is here for this $151,000. But, we cannot go around boon-dogging the school board and other people that we don't have money. Cry poverty, cry poverty then come up and ask for $151,000 when (1) either we knew it was there in the first place or we were snowing people or we didn't know . . .

Chairman: Mr. Vacca . . .

Vacca: Mr. Chairman, I'm entitled to my opinion and I'm saying that. Please don't interrupt me.

Chairman: I'll interrupt you. (inaudible) proper choice of words when you're telling (inaudible) boon-doggling.

Vacca: Mr. Chairman, you don't have the right to tell me.

[p. 201] Barletta: I have every right to tell you how to do debate down here.

(loud arguing in the background)

Vacca: No, you don't have the right to tell me what words to use, Mr. chairman. I have every right (inaudible) citizens of this City to speak my piece and not . . .

Gibson: Go right ahead . . .

Barletta: I will go right ahead but if you don't stop it, you're gonna have an early night.

Vacca: I know it, David.

Barletta: You know it, you want to know it.

Vacca: You and John – go ahead.

Barletta: (inaudible) Five minute recess. Have him removed, Mr. Foresteire.

Barletta: We'll see who's playing games and who's not. He's going home.

(loud noise in the background)

Gibson: The business that we transacted . . . unless so ratified or approved when there is a quorum or a subsequent meeting the . . . can be legally transacted at a quorumless meeting . . . an adjourned meeting, adjourned recess, take any . . . so we can . . .

(?): We can do that. We have 5 members. If we do lose a member, we can conduct it and confirm it at the next meeting. That would probably be the way we'd get around hiring these individuals because if we don't get a contract for these individuals, we're gonna . . .

Vacca: . . . Let's just vote on these 7 people so we can get out of here because I intend to vote for these 7 people despite the shenanigans that are going on because (inaudible) the students in the city despite what the teachers do? What do we do? What do we do?

Man: We vote on it. Can I have the floor?

Hart: Sure. I am recommending to the full board the appointment of Carolann Hill to the position of City Reading Parlin. I'd like to put that in the form of a Motion (inaudible) action.

[p. 202] Barletta: Officer, (inaudible), I'd like to have this member removed, please.

Man: He doesn't know which one.

Barletta: This member right here. Mr. Vacca.

Vacca: I'm not gonna leave. You're gonna have to take me out because I'm a member of this school committee (inaudible) You're gonna carry me out! I'm not leaving. I'm an elected member of this school board.

Barletta: We'll see who's gonna be threatened down here. You're not gonna threaten this chairman.

(loud arguing in the background)

Vacca: I'm not leaving.

Officer: Could . . . the wagon come down to the administration building, please.

(loud noise in the background. It sounds like they're taking him out and calling for security).

. . . announce . . . there's no quorum.

Gibson: (inaudible) take it up either another day or at the next school committee meeting.

Man: Mr. Gibson, could we elect these people and then verify it at the next meeting?

Gibson: I'd rather not. I'd rather not. (inaudible) no qualms. (inaudible) next meeting.

(loud noise in the background)

Man: (inaudible) to the next schedule school board meeting.

(loud arguing in the background)

Man: I will call this meeting adjourned til the next school board meeting on September 19th.
